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**In the Supreme Court
of the United States**

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon court of appeals affirming respondent Murphy's conviction of second degree murder (A. 76-84)[®] is reported at 2 Or. App. 251, 465 P.2d 900, cert. denied 400 U.S. 944 (1970). The opinion of the United States District Court for the District of Oregon denying Murphy's petition for a writ of habeas corpus (A. 68-69) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit

[®]Throughout this brief, "A." refers to the printed Appendix; "Tr." refers to the 6-volume transcript of Murphy's state-court trial, Exhibit 1 in the present federal habeas corpus proceedings.

reversing the judgment of the district court (A. 71-73) is reported at 461 F.2d 1006 (9th Cir. 1972).

JURISDICTION

The judgment of the United States Court of Appeals (A. 74) was entered on May 30, 1972. A timely petition for rehearing en banc was denied on July 6, 1972 (A. 75). The petition for a writ of certiorari was filed on August 7, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

When police officers have probable cause to arrest or search a murder suspect, does the Fourth Amendment prohibit them from momentarily detaining the suspect and scraping his fingernails for evidence, without obtaining a search warrant or formally arresting him, when the delay required to obtain a warrant would frustrate the search by allowing the suspect to clean his fingernails, and when a formal arrest would cause a greater invasion of the suspect's privacy than the momentary detention and scraping of his fingernails?

STATEMENT OF THE CASE

A state-court jury convicted Daniel P. Murphy, respondent herein, of the second-degree murder of his wife. His conviction was affirmed by the Oregon court of appeals. *State v. Murphy*, 2 Or. App. 251, 465 P.2d 900 (1970) (A. 76-84). This Court denied his petition for a writ of certiorari. 400 U.S. 944 (1970).

Murphy then commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 U.S.C. §§ 2241 et seq. Upon review of the state-court record, the district court denied relief (A. 68-70). On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded (A. 71-74). Petitioner Cupp, Murphy's custodian, seeks reversal of the Ninth Circuit's decision and affirmance of the judgment of the district court.

Only one issue has been raised and preserved through-

out these proceedings. In Murphy's state-court trial, as part of its showing that Murphy strangled his wife while she was in bed, the prosecution introduced evidence that certain scrapings taken from under Murphy's fingernails consisted in part of skin cells, blood cells, and white cotton and rayon acetate fibers (Tr. 331-337). Murphy contends, and petitioner herein denies, that the finger-nail scrapings in question were unconstitutionally seized from him.

The facts concerning the seizure of the evidence in question are generally undisputed. On the morning of August 25, 1967, Detectives Hutchins and Prunk, of the Portland, Oregon, police bureau, were assigned to investigate the murder of Doris Murphy, whose body had been discovered by the Murphys' son, Patrick (Tr. 28, 35, 52; A. 29, 35, 50-51). They arrived at the Murphy home shortly after 8 a.m. (Tr. 28; A. 29). The deceased was found lying on her back in a perfectly made-up bed. She was clad in a pink and white rayon acetate nightgown, which was fully extended over her body (Tr. 35, 111, 146, 153-154, 278-279, 337-338; A. 35). There were lacerations and abrasions on her throat, of a sort which could have been left by an assailant with fingernails; and it appeared to the detectives that she had been strangled (Tr. 29, 35, 41, 44; A. 29, 35, 41, 44). There were no signs of forcible entry, struggle, or robbery (Tr. 35, 146-154; A. 35).

From Patrick Murphy, the detectives learned that respondent Murphy had not been at the Murphy house

for some time, but had been expected home on the night of August 24, and that Patrick had heard something, apparently the sound of a motor vehicle, in the driveway that night (Tr. 35, 44-45, 58; A. 35, 44, 56). They also learned that Murphy and the deceased had not been getting along well, and that there had been at least one fight between them during the preceding year, after which bruises had been visible on the deceased's face and neck (Tr. 34-36, 58; A. 34-36, 58). While talking to Patrick, the detectives observed that he bit his fingernails so extensively that one of the detectives described him as having "absolutely no fingernails" (Tr. 41; A. 40-41).

About noon on the same day, August 25, Detective Prunk telephoned Camp Sherman, Oregon, where Murphy was then residing, and learned that Murphy had left Camp Sherman to go to Portland the night before and had not returned (Tr. 31-32, 292-293; A. 32). Prunk left word of Mrs. Murphy's death and asked that Murphy call the police station on his return (Tr. 31-32, 279-280, 463; A. 32).

Murphy returned Prunk's call about 4 p.m. (Tr. 37-38; A. 37-38). When Prunk confirmed that Mrs. Murphy was dead, Murphy immediately began an account of where he had been the night before, without asking any questions about his wife's death, and without being asked where he had been (Tr. 37-38, 49; A. 37-38, 48). He told Prunk that he had left Camp Sherman about 8 p.m. on the night of the 24th in an old pickup truck,

to bring a washing machine to Portland to be repaired; that he had stopped in Salem for a couple of drinks on the way and had arrived at his Portland home quite late; that the door of the house was locked, and he had slept in the pickup in the driveway, rather than disturb his wife; that he had awakened after some time and tried to push the truck out of the driveway to avoid making noise, but ultimately had to start the engine; and that he had driven off to another place where he had slept until daylight and then taken the washing machine to be repaired (Tr. 37-38; A. 37-38). At Prunk's request, Murphy then agreed to return to Portland to discuss the case further (Tr. 38; A. 38).

About 7:45 p.m., Murphy came to the Portland police station and talked to Detectives Hutchins and Prunk (Tr. 38-39; A. 38-39)). He repeated essentially the same account of his activities on the night of the 24th that he had related to Detective Prunk over the telephone, but exhibited a general lack of interest in the murder of his wife which struck the detectives as unusual (Tr. 48-49, 54-56; A. 48-49, 52-54).

During the conversation, Detective Hutchins noticed a dark spot under Murphy's right thumbnail (Tr. 53, 61-62; A. 51-52, 60). This prompted him to think about taking fingernail scrapings, although, as he put it, the thought probably would have occurred to him anyway, in view of the lacerations which he had observed on the deceased's throat (Tr. 53, 62-63; A. 52, 60-61).

About 9:30 p.m., while Murphy conferred with two

attorneys who had come to the police station to represent him, the detectives discussed taking fingernail scrapings with a deputy district attorney who was also present (Tr. 32-33, 39-40; A. 33, 39-40). One the advice of his counsel, Murphy refused to consent to the taking of the fingernail scrapings in question (Tr. 66, 310-312; A. 64). Nevertheless, the police detained him long enough to scrape his fingernails, in the presence of defense counsel and others, and then released him (Tr. 32-33, 288-289, 316-317; A. 33). Murphy was not formally arrested until approximately one month later, when the grand jury returned an indictment accusing him of murder (Tr. 19; A. 21).

After reviewing these facts, both the Oregon court of appeals and the federal district court held, in essence, that:

- (1) At the time they obtained the fingernail scrapings in question, the police had probable cause to search Murphy's person, or to arrest him, or to do both;
- (2) Since the police had probable cause to arrest him, Murphy could not complain of the fact that he was merely detained momentarily, while the scrapings were taken, and then released; and
- (3) The police were justified in immediately taking the fingernail scrapings from Murphy, since any effort to obtain a warrant for that purpose would have required the police, not only to detain him longer than they did, but also to restrain him, guard him, or otherwise place him in a position where he could not destroy the evi-

dence in question by clipping his nails, putting his hands in his mouth, going to the lavatory, or cleaning his hands in some other way (A. 68-69, 76-84).

The Ninth Circuit, however, disagreed, saying that:

"* * * there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant." (A. 72).

SUMMARY OF ARGUMENT

In this case, the police had ample cause either to arrest Murphy for the murder of his wife or to obtain a warrant to search his person for evidence of that crime. They needed to act immediately, without taking the time to obtain a warrant, because Murphy was aware that the police wished to scrape his fingernails and could easily have destroyed the incriminating evidence found under them, the moment he was left free to do so. The police took the challenged evidence in a reasonable manner, with defense counsel present. Their momentary detention of Murphy was a less serious invasion of his privacy than would have occurred had the police made the full-scale, formal arrest for murder which they had cause to make; and such an arrest would not, in itself, have conferred upon Murphy any constitutional protection from the search which was conducted. Accordingly, the search and seizure in this case was reasonable and should be upheld under the Fourth Amendment.

ARGUMENT

A. There Was Probable Cause for the Police To Act.

As pointed out in the Statement of the Case above, both the Oregon court of appeals and the federal district court held that, at the time the police obtained the evidence challenged in this case, they had probable cause either to arrest Murphy for the murder of his wife or to obtain a warrant authorizing them to scrape his fingernails for evidence of that crime. The Ninth Circuit's opinion also "assumes" that such probable cause existed, and a review of the record herein demonstrates that sufficient cause indeed existed to justify either action.

The police were investigating a murder by strangulation which had apparently been committed the night before the body was discovered. The absence of evidence of forcible entry of the Murphy house suggested that the killer had ready access to the premises. The undisturbed appearance of the bedroom in which the deceased was found indicated that the killer was well known to the deceased. The lack of evidence of robbery further indicated that the killer was not a burglar. Murphy and the deceased were known to have had a stormy marriage, and Murphy was known to have inflicted injuries to the deceased's face and neck in the past. Murphy was known to have been at the house on the night of the murder, although he claimed not to have gone inside. The decedent's son, the only other person in the house on the night in question, did not have fingernails which could

have made the lacerations observed on the victim's throat. When first contacted by the police, Murphy had immediately volunteered a great deal of information concerning his activities on the night in question, yet neither during his initial telephone conversation with the police nor during his conversation at the police station did he display any concern or curiosity about his wife's fate. Finally, when Murphy arrived at the police station, the officers observed a dark spot under one of his thumbnails, which reminded them that, in strangulation cases, physical evidence is frequently found under the fingernails of the assailant, and further suggested that Murphy was indeed the killer of his wife and that evidence of the crime would be found under his fingernails.

The present case is therefore not controlled by *Davis v. Mississippi*, 394 U.S. 721 (1969), one of the principal cases relied on by the Ninth Circuit. *Davis* involved the summary rounding-up and fingerprinting of numerous persons, including the appellant therein, when no probable cause existed for such investigatory detention of any of them. Such cause for the investigatory detention of Murphy was clearly present here.

The present case is also distinguishable from *Davis* in at least three other respects which should be noted in passing, because those distinctions further demonstrate that the police investigation herein was conducted with a reasonableness which was lacking in *Davis*. *Davis* was summarily taken to the police station against his will; Murphy came to the station voluntarily and was

detained, after he expressed a desire to leave, no longer than was necessary to secure the fingernail scrapings in question. Davis was not afforded counsel at the police station; Murphy had two lawyers assisting him throughout the taking of the evidence in question. And the evidence sought in this case was not of such an indestructible and always-obtainable nature as Davis's fingerprints, but readily-destructible traces of matter under a focal suspect's fingernails.

B. There Were Exigent Circumstances Justifying Immediate Action.

After assuming that such probable cause existed in this case as might have justified the issuance of a warrant authorizing the scraping of Murphy's fingernails, the Ninth Circuit held, contrary to the district court and the Oregon court of appeals, that there were no exigent circumstances which required the police to take immediate action to obtain the evidence challenged in these proceedings. This holding is clearly erroneous.

It is readily apparent that matter under the fingernails can be immediately and irretrievably lost, once the suspect clips his nails or cleans them in any one of a number of ways. And the risk that such evidence will be destroyed is obviously great when, as in this case, the person to be searched is alerted to the fact that the police are seeking that evidence, by a request that he consent to the scraping of his fingernails. The evidence involved in this case is, if anything, even more perishable

than the alcohol in the bloodstream involved in *Schmerber v. California*, 384 U.S. 757 (1966), in which this Court upheld the immediate, warrantless seizure of evidence from the person, when the delay involved in obtaining a warrant is likely to result in the loss of that evidence. The alcohol ingested by Schmerber would dissipate itself only over a comparatively substantial period of time. Murphy could have destroyed the evidence in this case, by clipping or cleaning his fingernails, in a matter of seconds.

Indeed, as previously noted in petitioner's reply to Murphy's memorandum in opposition to certiorari, the record of this case indicates that loss or destruction of the evidence challenged herein was not merely a theoretical possibility, but would actually have occurred if the police had not acted immediately. On trial, both the deputy district attorney who was present when the request for fingernail scrapings was made and the detective who took the scrapings testified that, when the request was made, Murphy "suddenly" and "immediately" looked at his hands and put them behind his back and into his pockets, moving them continuously (See Tr. 311-312, 317; Petitioner's Reply Memorandum, at 2).

For the foregoing reasons, the police were clearly confronted in this case with exigent circumstances justifying immediate action on their part to obtain and preserve the evidence challenged in these proceedings.

C. The Momentary Detention of Murphy Was a Minimal Intrusion upon His Privacy, and More Reasonable Than a Formal Arrest for Murder.

The opinion of the Ninth Circuit notes, as if it were dispositive of the present case, that Murphy was not formally under arrest at the time the challenged search was made, nor was he arrested for some time thereafter. In a similar manner, counsel for Murphy in his state-court trial acknowledged at one point that, if the police had formally arrested Murphy before they scraped his fingernails, "probably we wouldn't have too much to argue about" (Tr. 10-11; A. 13). This tacit assumption that under no circumstances can a search be made without a prior formal arrest, even when probable cause exists which would justify either an arrest or a search, does violence to the Fourth Amendment's standard of reasonableness.

As this Court has stated, in a different context, there is no constitutional right to be arrested: situations exist when arrest would be unwise despite the existence of probable cause. *Cf. Hoffa v. United States*, 385 U.S. 293, 310 (1966). Such a situation is presented here.

In this case, the police had at least that minimum quantum of probable cause which would have justified a formal arrest. Instead, they merely detained Murphy until they had obtained the fingernail scrapings which they sought and then released him. They took the scrapings in a reasonable manner and with defense counsel present. And, unlike the taking of the blood sample involved in *Schmerber v. California*, 384 U.S. 757 (1966),

the taking of that evidence did not require an actual intrusion into the body. The minimal interference with the person which occurred in this case "was so minor an imposition that [Murphy] suffered no true humiliation or affront to his dignity." See *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969) (seizure of hair samples from person in custody). See also *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968) (examination of defendant's hands under ultraviolet light); *Brent v. White*, 398 F.2d 503 (5th Cir. 1968), cert. denied 393 U.S. 1123 (1969) (genital scrapings revealing rape victim's blood).

Surely this momentary detention of Murphy constituted a less serious invasion of his privacy than a full-scale arrest for murder, with its resultant publicity and indefinite detention. The Fourth Amendment should not be held to require a greater invasion of privacy where a lesser one, equally justified, will serve the purpose of the criminal investigation. The search complained of here should not only be tolerated under the Fourth Amendment, but encouraged as more reasonable, and therefore preferable, to the more drastic alternative of a formal arrest.

This Court has held that probable cause will support an immediate search of an automobile, without a warrant, and without a prior arrest of the occupants, where the potential mobility of the automobile makes it likely that evidence will be lost if an immediate search is not conducted. *Chambers v. Maroney*, 399 U.S. 42, 49 (1970); *Carroll v. United States*, 267 U.S. 132, 158-159

(1925). The present case is one in which the actual mobility of a human being and his potential ability to destroy traces of incriminating evidence on his own person call for the application of a similar rule. Or, at the very least, the response of the police to the situation confronting them in this case should be upheld as reasonable, by application of those cases in which this Court has held that Fourth Amendment standards of reasonableness are not inflexible, but permit intermediate governmental responses of varying magnitude, in proportion to the gravity of the factual situation. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968); *McCray v. Illinois*, 386 U.S. 300 (1967).

In his memorandum in opposition to certiorari, Murphy suggested that, rather than being informally detained only momentarily, while the challenged evidence was taken, he should have been formally detained at the police station until a warrant authorizing the scraping of his fingernails could be issued (Memorandum in Opposition, at 2). But there is no greater reason to hold, in the case of persons, than there is in the case of automobiles that immobilization for an indefinite period of time is necessarily a "lesser" intrusion than an immediate search. Cf. *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970). And in this case, such an abnormal degree of restraint would have had to be placed on Murphy throughout any period of detention, if such highly perishable evidence as fingernail scrapings was to be preserved, that the immediate taking of that evidence was

clearly more reasonable under the Fourth Amendment.
As the Oregon court of appeals correctly observed:

"Unless [Murphy] were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. * * *" *State v. Murphy*, 2 Or. App. 251, 260, 465 P.2d 900, 904-905, cert denied 400 U.S. 944 (1970).

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the judgment of the United States District Court for the District of Oregon affirmed.

Respectfully submitted,

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January 1973

